

Ref: B9/32C

23 February 2011

Mr Allan Chiang
Privacy Commissioner for Personal Data
Office of the Privacy Commissioner for Personal Data
12/F, 248 Queen's Road East
Wanchai
Hong Kong

Dear Allan,

Sharing of Positive Mortgage Data

We note that the Law Society of Hong Kong (the Law Society) has made quite a number of comments in its submission on the Consultation Document which it has posted on its website. Given our assessment of the benefits of the proposal to the overall financial stability in Hong Kong and the importance of uploading the existing mortgage data to the effective working of the Credit Reference Agency (CRA) in achieving the objectives of the proposal, I am writing to provide you with our views in relation to the two points set out below which were raised by the Law Society in its submission to you, in the first instance.

- (i) Issue 1 - Even during the worst of the Asian financial crisis, losses due to mortgage defaults were not material. In the view of Law Society, this makes it difficult to justify the industry proposal on a cost benefit basis; and
- (ii) Issue 4 (Issue 3 in the Consultation Document)- Although the information on a consumer would be incomplete if pre-existing mortgage data is not contributed to the CRA, nevertheless, explicit consent from the consumers should be obtained. When the original consent was provided by the consumers, they were provided under "old" (current) system. It would not be in line with the principle of the data protection if information previously not provided to the CRA can now be submitted to the CRA

without consent from the data subject. This is similar to the bundled consent versus specific consent issue in relation to direct marketing. With the expanded system, specific consent should be obtained for all pre-existing mortgages.

On (i), it is not clear to us what kind of “cost” is referred to in the “cost benefit basis” argument. Does it refer to the monetary cost or the cost to privacy intrusion? If it is the latter, it has to be recognized that the right to personal privacy is not absolute and there is a balancing exercise involved between intrusion of privacy and the public interest. The proposal has kept the personal data to be transferred (i.e. in the form of a mortgage count) to a minimum and sufficient safeguards will be put in place to prevent their misuse. Therefore, every effort has been made to strike a right balance. If the “cost” refers to “financial costs”, the proposal will help credit providers in enhancing the completeness and accuracy of their credit risk assessment, thus creating a more efficient credit market and reducing the risk of asset bubble in the property market as a result of indiscriminate borrowing by some consumers and inability of credit providers to identify borrowers with more indebtedness than they can repay. The benefits appear to be obvious and far-reaching.

Also, I would like to point out that financial crises do occur from time to time but they are never the same because the overall circumstances such as monetary conditions change over time. Therefore, as the HKMA has pointed out many times before, the Asian Financial Crisis is not a relevant benchmark for reference in this context. It should be noted in particular that the overall monetary conditions during the time of the Asian Financial Crisis, i.e. from 1997 to 2003, was that the mortgage interest rates in Hong Kong were coming down considerably (a reduction of around nine percentage points from around 11% to about 2%) and this substantially eased the burden of borrowers in meeting mortgage repayments and hence helped significantly to contain any deterioration in the mortgage default rate. On the other hand, given the abnormally low interest rate environment at the moment, the mortgage interest rates in Hong Kong are expected to revert to a more normal level ultimately. If this process coincides with a downward adjustment in the property market, which most likely will be the case, this would adversely affect the repayment ability of mortgage borrowers as well as their will to continue servicing their mortgage loans. For this reason, it remains our supervisory judgement from a macro-prudential perspective that the fact that the mortgage book of the banking sector in Hong Kong performed relatively robustly during the 1997-2003 period is far from a

guarantee that the same credit performance would be repeated in the next property market adjustment cycle.

When considering this matter, it is also important to bear in mind that back in 2003, the number of residential mortgage loans in negative equity within the banking sector alone reached a historical high of about 106,000 cases with an outstanding mortgage value of HK\$165 billion as at end-June 2003. The unsecured portion of those mortgage loans then was estimated at about HK\$36 billion, and this negative equity amount could increase sharply if repossessed properties were put in the market for fire sale during a downward cycle of the property market. You could appreciate from the above figures that the potential value at risk of mortgage loans could be substantial for our banking sector, and could therefore have far-reaching implications for the stability of, and thus the public confidence in, the banking sector in Hong Kong. This is the main reason for the HKMA seeking to ensure that the credit risk management practices of banks could take into account the exposures of borrowers in terms of outstanding mortgages in order to safeguard the interests of depositors through maintaining overall banking stability. The HKMA remains of the strong view that there is a clear public interest angle in this regard.

On (ii), the Law Society's response appears to be indicating a policy preference for obtaining customer's consent rather than a legal argument based on a consideration of the relevant provisions of the Personal Data (Privacy) Ordinance (PDPO). Specifically, it is not clear from the comment on Issue 4 whether the Law Society has considered the "directly related purpose" argument as put forth in the Senior Counsel's opinion obtained by the Consumer Credit Forum (CCF) under the Hong Kong Association of Banks, a copy of which was previously submitted to you. You may wish to see in particular paragraphs 25 to 31 of the legal opinion which should help explain our and the industry's assessment of the legal position on Issue 4.

For your ease of reference, we have extracted these paragraphs below.

"25. DPP3 should be interpreted in the following manner:

(a) having regard to the wording of DPP3(a), the purposes covered by DPP3(a) are the purposes that were within the reasonable contemplation or expectation of the Customer or could be reasonably inferred as the customer's purpose at the time of the mortgage loan application when his data

were collected by the institution to which the application was made (the “Original Purposes”);

- (b) *DPP3(b) provides for a purpose directly related to the purpose referred to in DPP3(a). There is no ambiguity between the wording of DPP3(b) and the wording of DPP3(a). By separating DPP3(b) from DPP3(a) and not repeating in DPP3(b) the reference to “at the time of the collection of the data” which appears in DPP3(a), it is clear that the legislative intent is that a “directly related purpose” should be determined by whether it is directly related to an Original Purpose but without imposing a specific timeframe for the making of that determination.*
26. *I note that the PCPD on DPP3 in its book entitled “Data Protection Principles in the Personal Data (Privacy) Ordinance” (the “Book”) considers this very issue. In particular, paragraph 7.26 of the Book provides that the PCPD will take into account factors, such as the following, in assessing whether the act in question is done for a “directly related purpose” and thus covered by DPP3(b):*
- (a) *the nature of the transaction giving rise to the need for the using the personal data ; and*
- (b) *the reasonable expectation of the data subject.*
27. *For the reasons set out above, interpretation of DPP3(b) in the manner described in paragraph 25 above substantially reflects both the letter of the provision and the legislative intent. Purpose can however also be a matter of inference, from all the circumstances. The question as to whether a purpose is a “directly related purpose” is determined by whether it is directly related to an Original Purpose and is not dependent on whether the Customer reasonably contemplated or expected that “directly related purpose” at the time of the mortgage loan application when his personal data were collected. This interpretation does not contradict the PCPD’s approach and is in accordance with both it and the careful dichotomy made between DPP3(a) and DPP3(b), which eliminates any fixed initial time-point for DPP3(b).*
28. *Further, I note the PCPD’s comment in paragraph 7.30 of the Book that in the context of human resource management,*

disclosure of employees' personal data to Mandatory Provident Fund ("MPF") providers for the administration of the MPF scheme is an example of use of data for a directly related purpose.

29. *The MPF regime was only implemented in Hong Kong in the year 2000. Employers would not therefore have explicitly specified in the PDPO Notice distributed by them to employees before implementation of the MPF regime, that disclosure of employees' personal data to MPF providers was an Original Purpose. Moreover, such disclosure would not have been in the reasonable contemplation of the employees when their data were collected before the implementation of the MPF regime.*
30. *In that regard, the MPF regime is similar to the regime for sharing positive mortgage data in that collection of personal data pre-dated the implementation of the regime. On that basis of ambulatory interpretation, my opinion as to the interpretation of DPP3(b) is fully consistent with the PCPD's treatment of transfer of employees' personal data to MPF providers, as being a directly related purpose in the context of human resources management.*
31. *Adopting this interpretation of DPP3, granting and maintaining the mortgage loan are Original Purposes and ensuring ongoing credit worthiness of the Customer is a purpose directly related to those Original Purposes. Transfer of the Customer's personal data to the CRA under Step 1 is aimed at ensuring ongoing credit-worthiness of the Customer and is directly related to the Original Purposes and thus covered by DPP3(b)."*

As can be seen from the above extracts, what is required is a purposive statutory analysis which ought reasonably to lead to the view that the Legislature contemplated this very type of development as being easily within the objective construct of a directly related purpose. The fundamental purpose has not been changed by the current proposal, which still turns, as before, on credit profile analysis. The proposal is therefore consistent with DPP3(b) of the PDPO.

Apart from the MPF example cited in the Senior Counsel's opinion at paragraphs 28 to 30, the Senior Counsel's view is also supported by the Administrative Appeals Board (AAB) decision of *袁碧真 v Privacy Commissioner for Personal Data*, AAB No. 41/2006. In this case, the appellant provided her personal data, including her name, address, and

telephone number to the management company when she complained about the foul smell in the corridor outside her flat. The appellant had expressly told the representative of the management company that if it decided to make a report to the police, the management should preserve her anonymity. The AAB ruled that although the management company had promised the appellant that it would not disclose her personal data to the police, when the management company provided the appellant's personal data to the police, it was using the personal data for a purpose which was directly related to a purpose for which her data were collected in the first place¹. It is worth pointing out that in this case the ruling was made even though the transfer of information to the Police was not within her reasonable contemplation at the time the data was collected nor had she given her prescribed consent for the transfer.

In addition, we would respectfully submit that the analogy to "bundled consent" issue as referred to in a recent AAB case is inappropriate. The case considered by the AAB was related to the use of personal data for an unrelated purpose i.e. transfer of personal data to a third party for marketing the third party's good and services which was neither the Original Purpose nor a directly related purpose. On the other hand, DPP 3 does allow the use of data for original purposes and other purposes directly related to the original purposes. Based on the Senior Counsel's opinion, the HKMA is of the view that the current proposal involves the data being used for a purpose directly related to a core business activity of credit providers, and therefore there should be no legal impediment for existing mortgage data to be contributed to the CRA for the purpose of the current proposal.

Incidentally, in Section III of the "Guidance on the Collection and Use of Personal Data in Direct Marketing", it is noted that a data user may use personal data obtained from customers for marketing products or services directly related to the original purpose of collection of the data. As an example, it is stated that a bank may use personal data of its customers for marketing financial and insurance products. The Guidance Note also provides that, if at the time the data user collects the data it has no particular direct marketing activities in mind but subsequently decides to do so, then prior to conducting the direct marketing activities including the transfer of customers' personal data to third parties for the purpose of direct marketing, it must ensure that such use of data is directly related to the original purpose of collection

¹ On the facts of this case, section 58(2)(a) of the PDPO provides that personal data are exempt from the provisions of DPP3 anyway. However, the decision contains detailed analysis on the how DPP3 is to be applied and why the agreement between the data subject and the data user is irrelevant in considering whether DPP3 has been contravened.

of data, and consider informing the customers of its intention to do (and reason for doing) so.

Following from the above, if a data user is not required to obtain express consent from or notify a customer before using his personal data for marketing products and services directly related to the original purpose of collection of the data even though there was no such intention at that time, the same principle should clearly apply also to Issue 4 where the use of data directly relates to a core business activity of credit providers. To depart from this principle on this occasion will create inconsistency in the way the personal data privacy regime is administered.

I would also like to point out that one of the intended purposes of the Industry Proposal is to avoid borrowers and speculators over-leveraging themselves. If we set aside the above legal issue and instead require the industry to seek prescribed consent from customers (although this is legally not required) before contributing existing mortgage data to the database, as proposed by the Law Society, the HKMA is concerned that this will render the credit database incomplete and significantly less useful. This is because customers with an intention to hide from the banks the accurate information relating to their existing mortgages would be unlikely to give their consent. This would mean that those who have not been declaring all relevant mortgage information to lending institutions when applying for credits or who intend to take excessive borrowing will be able to continue with their act of providing false information or omitting information in their loan applications without any objective means for the credit providers to verify their indebtedness. The direct result is that the group of borrowers with the intention to hide their full indebtedness or with excessive lending will most likely not be included in the database, despite the fact that these are exactly the group of borrowers that should be covered by the CRA. The database will therefore be deficient and will not serve the principal objective of the proposal. We would in fact find it difficult to understand the rationale for introducing any arrangement or requirement that will effectively defeat the ability of the CRA to serve the public interest angle (i.e. maintaining overall financial stability in Hong Kong) which supports the implementation of positive mortgage data sharing in the first place.

In accordance with the spirit of PCO's guidance in Section III of the Guidance mentioned above, I understand that your office has been exploring the alternative of requiring credit providers to take all reasonably practicable steps to issue notification to the mortgage

customers before uploading of the existing mortgage data. As you are aware, the industry has obtained legal opinions confirming that customer notification is not necessary in these circumstances and they still have concerns about issuing such notification. That said, if you are of the view that the issue of customer notification is a good practice for enhancing transparency to customers and would provide you with the requisite comfort in allowing the uploading of existing mortgage data to the CRA, the HKMA will be happy to work with you and discuss with the industry with a view to requiring them to do this. We note this would also allay the concerns of the Consumer Council on this issue. The form of customer notification will take into account suggestions raised by the Consumer Council that the purpose(s) for which the consumer's personal data are to be used should be clearly spelt out and that the notice should be presented in a font size easily readable by customers.

We will provide you with our response to your further questions received by us yesterday as soon as possible.

In line with the treatment of the HKMA's submissions to you in response to the Consultation exercise, we will be posting this letter on the HKMA website.

Yours sincerely,

Arthur Yuen
Deputy Chief Executive

c.c. Policy 21 Limited
The Chairman, Consumer Credit Forum
The Chairman, HKAB
The Chairman, DTCA
FSTB (Attn: Miss Natalie Li)